SUPREME COURT, U.S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 263

NATOLIO A. LA PELUSO,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
First Appellate District, Division One

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement of the case	4
Material facts	5
Stage in proceedings and manner in which the federal questions were raised	6
Reasons for granting the writ	7
Conclusion	17
Appendix A	i
Appendix B	v

CITATIONS

Cases	Pages
Agnello v. United States, 269 U.S. 20, 30, 31; 46 S.Ct. 41	13
Amos v. United States, 255 U.S. 313; 41 S.Ct. 266	13
Brinegar v. United States, 338 U.S. 160	11
Carbo v. United States, 314 Fed. 2d 718 at 739	15
De Gorter v. The Federal Trade Commission, 244 Fed. 2d 270	9
Escobedo v. State of Illinois, 378 U.S. 478; 84 S.Ct. 1758	2, 7, 10
Goldstein v. United States, 316 U.S. 114; 62 S.Ct. 1000	12
Ker v. State of California, 374 U.S. 23; 83 S.Ct. 1623	3, 14
Lopez v. United States, 373 U.S. 427	8, 15
Miller v. United States, 357 U.S. 301; 78 S. Ct. 1190, 1198	14
Nardone v. United States, 308 U.S. 338	12
Olmstead v. United States, 276 U.S. 438; 48 S. Ct. 567	14, 15, 17
On Lee v. United States, 343 U.S. 747; 72 S.Ct. 967	9
People v. Cruz, 61 A.C. 959; 40 C.R. 841	13
People v. Dorado, 398 P.2d 361; 42 C.R. 169; 62 C.2d 338; 62 A.C. 350	10
People v. Fontaine, 237 A.C.A. 401	9
People v. La Peluso, 239 A.C.A. 792	9
People v. Malotte, 46 C.2d 59	9
People v. Weiss, 308 U.S. 321; 60 S.Ct. 269	2, 8
Rathbun v. United States, 355 U.S. 107; 78 S. Ct. 161	7
Silverman v. United States, 365 U.S. 305	15
Silverthorne Lumber Co. v. United States, 251 U.S. at 392; 40 S. Ct. at 173	11, 15
State v. Carbone, 183 Atl. 2d 1; 38 New Jersey 19	10
Tompkins v. Superior Court, 59 C. 2d 65	13

Pages

United States v. Gilbert Associates, 345 U.S. 361; 73 S.Ct. 701 9

United States v. Laughlin, 222 Fed. Supp. 264; 222 Fed. Supp. 623, 625 ..... 8, 16

Villano v. United States, 310 Fed. 2d 680 12

Wong Sun v. United States, 371 U.S. 471; 83 S.Ct. 407..11, 12

Constitutions

Amendments to the Constitution of the United States:

Fourth Amendment 3

Fifth Amendment 3, 10

Sixth Amendment 3, 10

Fourteenth Amendment 3

Statutes

California Penal Code:

Section 182 4

Section 640 ..... 4, 9

Section 653(J) 4, 9

Section 844 14

Federal Communications Act:

Section 605 (47 U.S.C.A. 605) 4, 6, 7, 9, 10, 12

28 USC 1257(3) 2

47 USC 501 10

Health and Safety Code:

Section 11501 4

Section 11530 4

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PEOPLE OF THE STATE OF CALIFORNIA,
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PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California, First Appellate District, Division One

A Writ of Certiorari is respectfully sought to review the Order of the District Court of Appeal of the State of California, First Appellate District, Division One, entered on January 28, 1966.

OPINIONS BELOW

The Opinion of the District Court of Appeal is reported in 239 A.C.A. 793, and is also annexed to this Petition in Appendix B.

JURISDICTION

The Opinion of the Court below was entered on January 28, 1966. A timely Petition for Rehearing (Certified Record, p. 352) was denied on February 18, 1966 (Certified Record, p. 360), and is unreported. A timely Petition for Hearing in the Supreme Court of the State of California (Certified Record, p. 361) was denied by that Court on March 22, 1966 (Certified Record, p. 433), and is unreported.

The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code 1257(3).

QUESTIONS PRESENTED

1. Whether, After a State Has Assumed and Accepted the Applicability of 47 U.S.C. Section 605 in Determining the Legality of Police Action and the Admissibility of Evidence in Its Courts, the State Can Apply Its Own Standards in the Construction of That Federal Statute, or Whether the State Must Follow This Court's Ruling in *People v. Weiss,* 308 U.S. 321, 60 S.Ct. 269, That Where Authorization to Intercept and Publish Is Sought To Be Established by Consent, the Consent Must Be Voluntary Consent.

2. Whether Statements Elicited from a Co-Defendant without Warning Him of His Right to Remain Silent and Right to Counsel in Violation of *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, Could Be Used to Establish Probable Cause for the Arrest of the Defendant, or Whether the Use of Such Statements Violated the Defendant's Rights Under the

Fourth Amendment As Applied Through the Fourteenth Amendment.

3. Whether, Where Arresting Officers Fail to Comply with a State Law Requiring Peace Officers to Demand Admittance and Explain Their Purpose Before Breaking into a Dwelling Place, and Exigent Circumstances Present in *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, Are Not Shown, There Was a Violation of the Defendant's Fourth Amendment Rights As Applied to the States Through the Fourteenth Amendment.

4. Whether, Where State Police Make an Attachment to a Telephone and Tape Record a Series of Conversations in Telephone Calls Made by a Party to the Dwelling Place of the Recipient of the Calls, Who Had No Knowledge that the Calls Were Being Recorded, and the Consent of the Calling Party Is Sought To Be Established by Hearsay, But Where the Undisputed Facts Show a Prima Facie Case of Coercion and Inducement to Consent in the Hope of Leniency, There Is Such an Invasion of Privacy as to Constitute a Violation of the Fourth Amendment as Applied to the States Through the Fourteenth Amendment.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix A:

The Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

Section 605 of the Federal Communications Act (47 U.S.C.A. 605).

Sections 640 and 653(J), California Penal Code.

STATEMENT OF THE CASE

Petitioner was convicted, after trial by jury, on October 16, 1964, in the Superior Court of the State of California, in the City and County of San Francisco, for violation of Section 11501 of the Health and Safety Code of the State of California.

Petitioner was indicted on March 26, 1964, with Manuel A. Miranda on four counts, to wit: Count One, conspiracy to violate Section 11501 of the Health and Safety Code of the State of California (unlawful transportation of narcotics in violation of Section 182 of the Penal Code); Count Two, violation of said Section 11501; Count Three, violation of Section 11500 of the Health and Safety Code of the State of California (unlawful possession of a narcotic, heroin); Count Four, violation of Section 11530 of said Code (unlawful possession of a narcotic, marijuana).

Petitioner was tried alone. The jury found him not guilty as to Count Four, and guilty as to Counts One, Two, and Three. The Court granted the Petitioner's motion for a new trial as to Counts One and Three, and denied such motion as to Count Two.

On January 22, 1966, the Petitioner was sentenced to the State prison. (Certified Record, p. 014)

MATERIAL FACTS

Prior to the indictment, a "special employee" of the San Francisco Police Department, who was a narcotics addict, under arrest, being furnished money by the police, and being given "some consideration" in regard to immunities, made a series of at least thirteen telephone calls to the hotel room residence of the Petitioner and the co-Defendant, Miranda. The last telephone call in which Petitioner participated was sometime prior to February 16, 1964.

When the calls were made, four inspectors of the San Francisco Police Department were generally present. The inspectors made an attachment to the telephone connected to a tape recorder. Petitioner and Miranda were unaware that the calls were being intercepted and recorded.

The tapes were played to the jury. (Certified Record, p. 064, 087, 215)

The "special employee" did not testify as to his consent to the monitoring, recording and publication of the telephone calls. That "consent" was testified to only by one of the inspectors. (Certified Record, p. 063, 064) No evidence of voluntary consent was presented.

The charges against the "special employee" were dismissed.

As a result of the calls, one of which set up a sale to the "special employee", Miranda was arrested on March 3, 1964, shortly after leaving the hotel, while driving a car registered to the Petitioner. Narcotics were found on his person. Arrested at gun-point, and

in handcuffs, Miranda told the inspectors, in answer to their questions, that he had more narcotics in the hotel room and that Petitioner was in the room. He was not informed of his right to remain silent and his right to counsel.

Still handcuffed, Miranda was walked a block back to the hotel. One of the inspectors remained at the switchboard, one remained with Miranda about thirty feet from the door to the room which Petitioner and Miranda occupied, while two of the inspectors entered the closed unlocked door without knocking or announcing their identity. Petitioner, in bed, was arrested at gun-point by the officers. Narcotics were found in a nightstand between the two beds in the room, and in a plastic case in a dresser drawer.

STAGE IN PROCEEDINGS AND MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED

The objection to the tapes being played to the jury on the basis of such playing constituting a violation of 47 U.S.C.A. 605 was raised at the trial. (Certified Record, pp. 064, 087, 215) That question was further raised on the Petitioner's brief in his appeal to the District Court of Appeal. (Certified Record, p. 288)

The objection that the tapes were obtained in violation of the Fourth and Fifth Amendments to the United States Constitution was raised at page 216 (Certified Record) at the trial, and also on page 291 (Certified Record) in Petitioner's Brief on the appeal in the District Court of Appeal.

The objection to Miranda's declarations made after his arrest was made at the trial at page 169 (Certified Record). In the Petitioner's brief to the District Court of Appeal, the issue was raised that statements obtained in violation of *Escobedo v. State of Illinois,* supra, could not be used to establish probable cause for the arrest of the defendant. (Certified Record, p. 294)

The objection that the entry of the officers into the hotel room constituted a violation of the Fourth Amendment was made by objection to evidence so obtained at page 216 (Certified Record). In the brief to the District Court of Appeal, the same question was raised at page 299 (Certified Record).

The objection that the attachment to the telephone by the police and the interception and recording of the telephone calls constituted a violation of the Fourth Amendment was raised in the brief to the District Court of Appeal at page 291 (Certified Record), and at the trial at page 216 (Certified Record).

All of the points were raised in the Petition for Hearing to the Supreme Court of the State of California. (Certified Record, p. 361)

REASONS FOR GRANTING THE WRIT

I

Telephone tapping, interception of telephone messages and their recording and divulgence, since *Rathbun v. United States,* 355 U.S. 107, 78 S.Ct. 161, have been held not in violation of 47 U.S.C.A. 605, where the consent of one of the parties has been obtained.

In *People v. Weiss,* 308 U.S. 321, 60 S.Ct. 269, this Court held that the statute contemplated *voluntary* consent and not enforced agreement to publication. Since *Weiss,* the wisdom of the Court's ruling in that case was shown by *United States v. Laughlin,* 222 Fed. Supp. 264; 222 Fed. Supp. 625. In *Laughlin,* a District Attorney had testified to the fact of the "consent" of one of the parties, and on that basis tapes were admitted in evidence at the trial. Later in the trial, when the supposed "consenting party" testified, it became clear that the consent was obtained in the hope of leniency and resulted from coercion, so that the consent was not voluntary in the sense that this Court used in the term in *Weiss.*

In this case, the testimony as to consent was hearsay and prima facie established a case of consent induced by coercion and in the hope of leniency. This case is much clearer than *Weiss* and much clearer than *Laughlin,* because in this case the absent consenting party was shown by evidence in the case given by the police themselves, that the absent informer was a narcotics addict, under arrest, was being furnished money by the police, was being granted immunities by the police, and that subsequently the charges against him were dismissed.

In *Lopez v. United States,* 373 U.S. 427, Chief Justice Warren concurred in the decision affirming a conviction where a recording had been played at the trial, and holding that the method of obtaining the recording had not violated the Fourth Amendment. In that case, the "consenting" party (by analogy) was

an Internal Revenue Agent who testified to the conversation which the recording corroborated. The Chief Justice's separate concurring opinion was clear that his opinion was based primarily on the fact that the Agent had testified as to the conversations, 373 U.S. 441-446, and that if the case was similar to *On Lee v. United States,* 343 U.S. 747, 72 S.Ct. 967, where the informer did not testify, he could not have concurred.

California accepts that 47 U.S.C. 605 is applicable to evidence introduced in its Courts. *People v. Malotte,* 46 C. 2d 59; *People v. Fontaine,* 237 A.C.A. 401, and in this case, *People v. La Peluso,* 239 A.C.A. 792.

California has, in addition, its own statutes which are calculated to prevent the connection with telephone instruments, wire tapping and divulgence of information so obtained. Sections 640 and 653(J) of the California Penal Code.

In the Opinion in the District Court of Appeal, the Court found that voluntary consent had been established. In applying 47 U.S.C.A. 605 in this way, the California Court interpreted the Federal statute in a way in conflict with the applicable decision of this Court in *Weiss.*

The California Court was bound to apply the decisions of the Federal Court as binding as to the construction and effect of the Federal statute. The construction of a Federal law by the Supreme Court is binding on State Courts. *De Gorter v. The Federal Trade Commission,* 244 Fed. 2d 270; *United States v. Gilbert Associates,* 345 U.S. 361, 73 S.Ct. 701.

If State Courts choose to exclude evidence obtained in violation of a Federal statute, as they do in California and in New Jersey (see *State v. Carbone,* 183 Atl. 2d 1, 38 N.J. 19), then they must follow this Court's interpretation and construction of that statute in order to determine what is a violation of that statute.

Furthermore, Section 605 is penal in nature. The first violation is punishable by a fine of not more than $10,000, or by imprisonment for not exceeding one year, or both. 47 U.S.C. 501. Additional violations are punishable by the same fine and not more than two years imprisonment, or both. Persons should be entitled to fair notice as to what conduct constitutes a violation of the statute.

II

California, as it must, has applied the law of *Escobedo v. State of Illinois* in its Courts. The landmark case is *People v. Dorado,* 398 P.2d 361, 42 Cal. Rptr. 169, 62 A.C. 350, 62 C.2d 338. There is no question that the statements of Miranda were obtained in violation of the Fifth and Sixth Amendments to the Constitution of the United States. Whether these statements can be used as a basis for probable cause to arrest another is an important question of Federal law which has not been, but should be, settled by this Court. The District Court of Appeal held in this case that the Petitioner had no standing to raise *Dorado* objections to pre-*Escobedo* declarations of a non-objecting co-Defendant, which were used to establish reasonable cause for his arrest.

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any other, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Silverthorne Lumber Co. v. United States,* 251 U.S. at 392, 40 S.Ct. at 173.

In this case there was no independent source from which the police learned of the evidence of narcotics in the room and the Petitioner's presence therein.

Probable cause to arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. *Brinegar v. United States,* 338 U.S. 160. In this case, Miranda's statements were admitted at the trial on the issue of guilt. In any case, *Brinegar,* and other cases on this issue permit hearsay, but give no sanction to admit on the issues of probable cause statements elicited in violation of constitutional rights.

The District Court of Appeal pointed out that in *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, this Court did not display equal solicitude for each defendant. But in *Wong Sun,* evidence which was obtained as a result of statements given by Toy in violation of his rights was held inadmissible as to Yee, in whose bedroom the evidence was found. The Court did, however, admit as to Wong Sun, the evi-

dence found in Toy's bedroom because the seizure of that evidence invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.

In this case, as in *Wong Sun,* it was the petitioner's bedroom, i.e. the privacy of Petitioner's person and premises, which were invaded as a direct result of statements improperly obtained from Miranda.

Wong Sun also cited *Goldstein v. United States,* 316 U.S. 114, 62 S.Ct. 1000, which held that illegally obtained wire tap evidence could not be successfully objected to by one not a party to the conversations. It is submitted, however, that the case of *Goldstein* is inapplicable to this case for the reason that, in this case the statements obtained from Miranda were obtained in violation of basic constitutional privileges embodied in the Fifth and Sixth Amendments. *Goldstein* dealt with evidence obtained merely in violation of 47 U.S.C.A. 605, which this Court, as in the past, repeatedly said does not encompass constitutional protections. But in interpreting 47 U.S.C.A. 605, this Court has held that a party to illegally overheard conversations could object to evidence obtained derivatively from those conversations. *Nardone v. United States,* 308 U.S. 338.

The question as to whether evidence obtained in violation of constitutional rights can be used to establish probable cause for the arrest of another must be examined in this case because the Federal test, as well as the State test of consent to the search of Petitioner's room, has not been met. *Villano v. United States,*

310 Fed. 2d 680; *Amos v. United States,* 255 U.S. 313, 41 S.Ct. 266; *Tompkins v. Superior Court,* 59 C.2d 65.

Without Miranda's statements the police would not have had probable cause to arrest the Petitioner. The search of the hotel room was not incidental to Miranda's arrest. *People v. Cruz,* 61 A.C. 959, 40 C.R. 841; *Agnello v. United States,* 269 U.S. 20, 30, 31, 46 S.Ct. 41.

III

In this case, the police opened a closed door and entered the hotel bedroom of the petitioner in the night time, without a warrant, without knocking, without having demanded admittance, without identifying themselves, and without having explained the purpose for which they desired admission.

> "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying tradition imbedded in Anglo-American law, has declared in Section 3109, the reverence of the law for the individual's right of privacy in his home. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized

should have been suppressed." *Miller v. United States,* 357 U.S. 301, 78 S.Ct. 1190, 1198.

California has codified these basic rights in Section 844 of the California Penal Code, which requires that peace officers demand admittance and explain their purpose before breaking into a dwelling place.

In *Ker v. State of California,* 374 U.S. 23, 83 S.Ct. 1623, it was held that exigent circumstances would authorize non-compliance with Section 844. In that case there was evidence of such exigent circumstances in that there was evidence that the person sought to be arrested had furtively earlier that evening eluded the police, and there was evidence that the police entered quietly in order to prevent the destruction of evidence. 374 U.S. 28.

In this case there was *no* evidence that any exigent circumstances existed. There was no testimony, nor can any inference be drawn from any testimony, that had the officers complied with the law their peril would have been increased, the arrest frustrated, or evidence destroyed.

To find exigencies in this case for non-compliance with basic rights, or to permit any inference of exigencies not reflected in any shred of the record in this case, would simply mean wiping out and abrogating a constitutional right deeply rooted in our heritage.

IV

The Petitioner urges the Court again to reconsider its decision in *Olmstead v. United States,* 276 U.S.

438, 48 S.Ct. 567, holding that the Fourth Amendment does not prohibit wire tapping and interception and recording of telephone conversations where there has been no "physical intrusion". The Petitioner urges on the Court once again the issues and considerations raised in the dissent in *Olmstead* and other cases, particularly *Lopez v. United States,* 373 U.S. 427.

The principal concern in eavesdropping cases is the protection of the right of privacy. In *Silverman v. United States,* 365 U.S. 505, the Court refused to admit eavesdropping evidence where a spike mike had been driven into the defendant's premises by a fraction of an inch. Federal Courts below, however, are discarding the concept that the mechanical nature of the intrusion controls its constitutionality. In *Carbo v. United States,* 314 Fed. 2d 718, at 739, the Court said:

> "... We do not understand that the mechanical nature of method of overhearing is now to be the guidepost in this area."

In this era of technical advance, is the right of a man to retreat into his own home any less because an induction coil is used rather than a spike? Is there really any difference between looking into a man's bedroom and listening to what is there said—from a foot away—or a mile away? The Constitution cannot prevent betrayal by a person in whom confidence is reposed; it does prevent secret police observation or listening to people in places ordinarily understood to afford personal privacy.

Another Federal case which cannot understand the distinctions drawn in the cases involving wire tapping, interception and recording is *United States v. Laughlin,* 223 Fed. Supp. 623, where the Court said the following:

> "All this highly technical language to the effect that a mechanical device attached to a telephone constitutes an interception and a mechanical device or an electronic device or an induction coil not directly attached to a telephone or a telephone line, but that is capable of recording a whole conversation between the parties, is not an 'interception' is sheer nonsense. The Courts should meet the issue squarely and should not attempt to make technical distinctions between the mechanical methods used. What difference does it make whether a tapped wire records a conversation or an induction coil or other mechanical device does the same thing? To say that there is a difference is a sham and an illusion."

In any event, the Court should consider the particular circumstances of this case in determining whether the police action constituted a violation of the Fourth Amendment. Repeatedly and persistently, through the medium of an informer who was a narcotics addict then under arrest, being furnished money by the police, and being granted immunities, against whom charges were later dismissed, the police monitored, overheard and recorded telephone conversations in calls made to Petitioner's residence. These undisputed facts, presented by police testimony at the trial, present an undeniable prima facie case that the calls were made under coercion and in the hope of leniency.

This feature of the case warrants emphasis among the reasons for granting Certiorari on this point.

If the Court continues to apply the "no physical intrusion" test of *Olmstead,* or "waiver of privacy" rationale of other cases, are we someday to turn on the television set only to have someone watch *us*? Will someone else look through the mirror when we shave? Will the price of air through an open window be whatever anyone, anywhere, can hear or see through whatever means as long as there is no "physical intrusion"? Today, I may not talk freely on the telephone in my home and be constitutionally protected from secret police eavesdropping, monitoring and recording; tomorrow I may not feel free to talk at all.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

Dated, San Francisco, California,
June 8, 1966.

Respectfully submitted,
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(Appendices A and B Follow)

Appendix A

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

FEDERAL COMMUNICATIONS ACT

47 U.S.C.A. Section 605

Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no

person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

CALIFORNIA PENAL CODE

Section 640

"Every person who, by means of any machine, instrument or contrivance, or in any other manner, wilfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who wilfully and fraudulently, or clandestinely, or in any other unauthorized manner, reads or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line or cable, or is being sent from, or received at any place within this State . . . is punishable (by fine and imprisonment)."

Section 653(J)

"Every person or his authorized agent not a party to the communication who, intentionally and without the consent of any party to a confidential communication, by means of any electronic or amplifying or recording device, eavesdrops upon or records a confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished (by fine and punishment)."

Appendix B

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Criminal No. 5006

People of the State of California,
Plaintiff and Respondent,
vs.
Natolio A. La Peluso,
Defendant and Appellant.

OPINION

Defendant appeals from a judgment sentencing him to state prison following his conviction by verdict of a jury of the offense of unlawful transportation of narcotics in violation of section 11501 of the Health and Safety Code. Defendant and another were originally jointly charged by indictment with (1) conspiracy to violate section 11501 of the Health and Safety Code in violation of section 182 of the Penal Code, (2) violation of section 11501 as noted above, (3) possession of heroin in violation of section 11500, and (4) possession of marijuana in violation of section 11530 of the same code. Defendant was separately tried and the

jury found him guilty of the first three charges and acquitted him of the fourth. The trial court granted the defendant's motion for a new trial as to counts one and three, denied the motion as to count two, and denied defendant probation and sentenced him to prison on that charge. This appeal ensued.

The questions involved are as follows: (1) Were tape recordings of telephone conversations erroneously admitted in evidence in violation of defendant's constitutional rights, or state or federal law? (2) Did the trial court commit prejudicial error by admitting in evidence statements made by defendant's codefendant to the police after his arrest? (3) Was the search of the hotel room occupied by defendant illegal, and if so, were the items found therein improperly admitted in evidence? (4) Was defendant's arrest illegal, and if so, were the items found at the time and place thereof improperly admitted in evidence? (5) Is the evidence insufficient to support the conviction of the charge of transportation for which defendant was sentenced? It is herein concluded that an analysis of the record and the law applicable thereto exacts a negative response to each question and prescribes an affirmance of the judgment.

The Facts

An inspector of the San Francisco Police Department attached to the narcotic detail testified that during the period from January to March 1964, arrangements were made to have a special employee make monitored and recorded telephone calls from

the headquarters of the narcotic detail in the Hall of Justice to a number listed for the Atherton Hotel and the extension for room 710 at those premises. A transistorized device was attached adjacent to the telephone used by the special employee, and transmitted the conversation by induction to a tape recorder. Four officers generally were present and the calls were monitored by use of extension telephones. The special employee was aware that the conversations were being recorded and monitored and gave his consent. No advice was given to the parties on the other end of the line that the conversations were being monitored or recorded.

The special employee was addicted to narcotics and was under arrest. He was furnished money by the authorities and charges against him were later dismissed. He had been used as an informer by the authorities since 1960 and had been instrumental in furnishing information on which at least three prior convictions of violations of the narcotic laws had been secured.

The inspector did not know of his own knowledge who occupied the room in question at the time of the telephone conversations, but he recognized the defendant's voice from former acquaintance with him, and found that the codefendant was the person who appeared in response to and in accordance with the arrangements made in the last telephone conversation held. On voir dire examination, out of the presence of the jury, defendant admitted that the room was registered to him and that he had lived there during

the period in question. In the same proceedings his codefendant testified he was also registered at the hotel, although under an assumed name, and that he was living with defendant.

The recordings were admitted into evidence, and are before this court as transcribed in the typewritten record. The first call was made January 31, 1964. Four calls were uncompleted. Apparently six calls, the last of which was before February 16, 1964 were completed to defendant, and four calls were completed to his codefendant, culminating in that of March 3, 1964 which led to the latter's arrest. These conversations, despite guarded language, indicate that the defendant was familiar with his codefendant's activities; that he communicated the requests of the special employee to his codefendant; that the codefendant was attempting to secure what the special employee desired; and that in one conversation between February 6th and 16th, the defendant himself offered to get something for his caller if the codefendant was unsuccessful.

The inspector amplified the partially inaudible record of the last conversation which reflected that defendant's roommate would meet the special employee and furnish him five "spoons" of heroin for $60 a spoon.

The officers went to the vicinity of the hotel. The informer gave them a description of the codefendant and identified the car he used. The suspect came out of the hotel, entered the described vehicle, drove off and was intercepted by the officers approximately a

block away. The inspector saw the driver move across to the passenger's side of the car and put his right hand in his coat pocket. The officer then opened the car door, restrained the defendant, removed his hand from his coat pocket, and extracted what proved to be heroin wrapped in contraceptives and tissues.

Over defendant's objection the inspector was permitted to testify to a conversation with the codefendant at the scene of his apprehension. Admittedly he was not advised of his right to remain silent, or his right to counsel, or of the fact that anything he said might be used against him or anyone else. According to the inspector, the codefendant was told he was under arrest, and in response to the inspector's questions indicated that he had no more contraband secreted on his body, but did have more contraband in his room in a night stand between two beds. The inspector related that he started to break down and was crying; that he had no objection to going back and stated he wanted to get the matter cleaned up; that he gave another inspector the key to his room, but said that he did not think the door was locked; and that he told the officers that defendant was in the room, unarmed, and watching television.

It was ascertained that the car driven by the codefendant was registered to defendant. The officers proceeded to room 710 with the codefendant who, according to the inspector, gave them the key and consented to the entry of the room. Two officers went in the unlocked door without using the key, and left the codefendant in the hall with a third officer.

On voir dire, out of the presence of the jury, it was developed that the officers had no warrant or search warrant; that the codefendant was handcuffed upon his apprehension and when he allegedly gave them the key; that he was left about 30 feet down the hall when entry was effected; and that the officers did not knock before entering the room. The codefendant, who had already plead guilty to transportation of heroin, confirmed that he had the conversation with the informer and started out in defendant's car to deliver the contraband; that he was apprehended, handcuffed and taken back to the seventh floor of the hotel by the officers; that he stood down the hall with one officer, while the others pushed the door open without knocking; and that he was not taken into the room until three or five minutes later after the officers had commenced searching. He denied that he owned or possessed a key to the room, or that he gave a key to one of the officers; and stated that the officers requested, without success, a key from the night clerk at the reception desk. He admitted he was upset, but denied he was crying, and testified that the officers never advised him of any legal rights, and did not request his permission, but told him to go back to the hotel and to his room. He admitted that he told the officers there was more contraband in the night stand in his room, and recited that he told them that defendant was there asleep, not that he was watching television as reported by the inspector.

The defendant also testified, out of the presence of the jury, on the issue of the propriety of the entry

into room 710. He stated that he was alone in the room asleep with the door closed when he was awakened by a loud bang on the door and three officers jumped in on him; that the inspector, whom he knew, confronted him with a pistol and grabbed and handcuffed him; that he never heard anybody ask for, nor did he give anyone permission to enter the room; and that no one asked him for permission to search the room. He asked "What's going on?" upon awakening and finding the officers in the room but made no other objection to the entry because he had no choice; and made no objection to the officers' search of the room because he had no choice after looking at the inspector's pistol and being handcuffed.

The court overruled defendant's motion to suppress all evidence which was the product of the entry and search of the room. The inspector testified that he found contraband, which proved to be heroin, in the drawer of the night stand; that in the same drawer were prescription vials and papers, which indicated on their face that they belonged to defendant, and a shoe shine kit; that defendant admitted that everything in the drawer was his with the exception of the kit and the contraband; and that his codefendant admitted ownership of the last-mentioned articles and the heroin which had been found on his person. The inspector observed another officer find a plastic box, which proved to contain marijuana and some heroin, in a dresser drawer. This box bore the fingerprints of the codefendant, but not those of defendant. A search of the room in its entirety and the personal effects of

the two occupants yielded nothing else of significance other than $180 in the pillow case of defendant's bed.

The defendant rested without presenting any testimony on his behalf.[1]

1. *The Tape Recordings*

Defendant contends that the recordings of the telephone conversations were inadmissible in evidence because they were secured in violation of section 605 of the Federal Communications Act (47 U.S.C.A. § 605),[2] in violation of sections 640 and 653 of the Penal Code of this state, and in violation of his rights under the Fourth and Fifth Amendments of the Constitution of the United States. The application of the foregoing statutes and the Fourth Amendment to the recording of conversations between an accused and an informer cooperating with the police was recently reviewed by this court in People v. Fontaine (1965) 237 A.C.A. 401, 410-413, wherein the applicable statutory provisions are set forth at length, and the cases construing them are reviewed. The conclusion found therein that neither the statutes nor the Constitution

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[1]With remarkable prescience the court on October 16, 1964, without the benefit of People v. Modesto (decided Feb. 11, 1965), 62 Cal. 2d 436, followed Malloy v. Hogan (decided June 15, 1964), 378 U.S. 1, refused to permit the prosecutor to comment on the defendant's failure to testify, instructed the jury that no presumption or inference could be drawn therefrom, and thereby avoided the pitfall provided by Griffin v. California (decided Apr. 28, 1965), 380 U.S. 609.

[2]It is assumed, as it was in People v. Malotte (1956) 46 Cal. 2d 59, 63-64, that the provisions of the Federal Communications Act are applicable in state criminal proceedings, but compare: Schwartz v. Texas (1952) 344 U.S. 199, 203 and United States v. Hendricks (1963) 217 F. Supp. 865, 867.

encompass eavesdropping or recording at the point of reception with the consent of the intended recipient is controlling in this case.

Defendant seeks to avoid the effect of the foregoing because, he asserts, the informer's consent, while under arrest, and with a promise of leniency was not genuine. In Weiss v. United States (1939) 308 U.S. 321, the court concluded: "We hold that § 605 rendered the communications [recordings and transcripts thereof taken without authorization or consent, but subsequently used by those who plead guilty and turned state's evidence] inadmissible, and that it was prejudicial error for the trial court to admit them either by permitting the defendants who turned state's evidence to read the transcripts or allowing the prosecutor to put the transcripts and phonographic records into evidence upon identification by the parties to the conversations." (308 U.S. at p. 331.) In United States v. Laughlin (1963) 222 F. Supp. 264, the court on the basis of *Weiss* granted a motion to suppress the evidence of a telephone conversation where the informant who placed the call testified that she only acquiesced in so doing because of a threat of prosecution for perjury in the very matter under investigation and a promise of leniency. (See same case (1965) 355 F. 2d 187, 191, fn. 18.) The effect of coercion upon an informant was raised, considered and rejected as impairing his consent in People v. Bates (1958) 163 Cal. App. 2d 847, in which case, as herein, the informant was not a witness. The court noted: "There is no evidence that she was threatened, placed under arrest, or

promised leniency." (163 Cal. App. 2d at p. 853.) This is not to say that such factors would necessarily vitiate consent as a matter of law. A distinction must be drawn between motivation, which may be induced by proper representations, and consent which may then either be freely granted or grudgingly conferred. Where consent is freely granted, the fact that the special employee is under arrest for a narcotic violation and cooperates following assurances that the fact of cooperation will be made known to the United States Attorney's office, will not negative that consent. (Black v. United States (9 Cir. 1965) 341 F. 2d 583.) The same circumstances here do not compel a finding contrary to the inspector's testimony that the special informant voluntarily consented to the procedure followed.

Defendant further points out that the law condemns invasions of privacy. (See Britt v. Superior Court (1962) 58 Cal. 2d 469, 472; Bielicki v. Superior Court (1962) 57 Cal. 2d 602, 607; Silverman v. United States (1960) 365 U.S. 505, 508-512; Jones v. United States (1959) 362 U.S. 257, 261; Williams v. United States (1959) 263 F. 2d 487, 489; and McGinnis v. United States (1 Cir. 1955) 227 F. 2d 598, 603.) He asserts that the procedure followed here, although concededly not a trespass, as in *Silverman,* was a reaching out into the privacy of his room to listen to what was said therein. This argument completely overlooks the fact, noted in many of the cases which are reviewed in *Fontaine,* that by projecting his voice over the wires defendant forsakes the shelter of the pri-

vacy of his abode, and submits his words to the risk of dissemination at the place where they are received. (In addition to cases referred to in *Fontaine*, see Todisco v. United States (9 Cir. 1961) 298 F. 2d 208, 209-210 (cert. den. (1962) 368 U.S. 989); Ferguson v. United States (10 Cir. 1962) 307 F. 2d 787, 788-789; Carnes v. United States (5 Cir. 1962) 295 F. 2d 598, 599-603; Douglas v. United States (4 Cir. 1957) 250 F. 2d 576-577; and United States v. Barbour (1958) 164 F. Supp. 893, 897.)

2. *Statements of the Codefendant*

Defendant contends that the court erred in admitting evidence of statements made by the codefendant at the time of his arrest, in which he admittedly told the officers that there was more contraband in the night stand in the room and that defendant was there, and allegedly gave up his key and consented to the entry and search of the room. He contends that the evidence was hearsay as to him; and that it was inadmissible because it was secured in violation of the principles set forth in People v. Dorado (1965) 62 Cal. 2d 338.

The People concede that this evidence of the codefendant's statements was hearsay and was improperly admitted before the jury in the trial on the merits. This concession appears to be well founded in law. (See People v. Roberts (1953) 40 Cal. 2d 483, 489; Callan v. Superior Court (1962) 204 Cal. App. 2d 652, 664; Wong Sun v. United States (1962) 371 U.S. 471, 490-491; and cf. People v. One 1948 Chevrolet Conv.

Coupe (1955) 45 Cal. 2d 613, 619-620.) It is then asserted that there was no prejudice to the defendant by the admission of testimony regarding these statements before the jury. This contention appears sound on the merits of the charge of transportation, because other evidence, if properly admitted, conclusively established the prior use by defendant of the telephone through which, and his immediate presence in the room from which the transaction emanated; the existence of contraband in the room in a place where it could be inferred he had knowledge, if not dominion and control of it; and the use of his car in the attempt to effect the delivery. No attempt was made to controvert the facts that contraband was found in the night stand or that defendant was in the room. The statements attributed to the codefendant concerning his key and consent had no direct bearing on the question of the guilt of the defendant; and, in fact, it may be said that the declarations taken as a whole tended to cast the sole responsibility on the codefendant and relieve the defendant of complicity.

As hearsay evidence the declarations were not properly, but, as seen, not prejudicially, before the jury. Nevertheless, unless otherwise inadmissible, they could be considered by the court alone on the issue of probable cause raised by the subsequent entry and search of the room and the arrest of the defendant therein. (People v. Haven (1963) 59 Cal. 2d 713, 715, fn. 1; People v. Gorg (1955) 45 Cal. 2d 776, 780-781; People v. Boyles (1955) 45 Cal. 2d 652, 656; Brinegar v. United States (1948) 338 U.S. 160, 172-174.) De-

fendant appears to assert that since the statements were obtained in violation of *Dorado,* they cannot be used to support probable cause for further action without in effect countenancing the violation of the codefendant's constitutional rights. He contends that if the statements were obtained in violation of the rights of another, he may properly object to their use against him. (See People v. Martin (1955) 45 Cal. 2d 755, 761.) The statements, however, are not the crux of the matter; the incriminating evidence is the evidence which evinced the truth of the matter stated, to wit, the heroin in the drawer with defendant's personal effects. Inquiry should therefore be directed to determine whether that evidence is "a fruit of the poisonous tree." (Nardone v. United States (1939) 308 U.S. 338, 341; and see Wong Sun v. United States, supra, 371 U.S. 471, 487-488; People v. Faris (1965) 63 A.C. 566, 571; and People v. Bilderbach (1965) 62 Cal. 2d 757, 763-768.) If the codefendant was objecting to the admission of the evidence found in the room it would be necessary to equate statements leading to the discovery of evidence which are secured from a voluntary, but *Dorado* violative admission or confession, with such leads as obtained from illegal wiretapping (*Nardone,* supra), or from verbal or other evidence derived from an unlawful entry and unauthorized arrest. (*Faris,* supra; *Bilderbach,* supra; *Wong Sun,* supra, 371 U.S. at pp. 484-487; and Silverthorne Lumber Co. v. United States (1919) 251 U.S. 385, 392.) An affirmative answer on this point would not be conclusive on the point of exclusion,

because it is necessary to further determine whether knowledge of the existence of the evidence in question can be attributed to a source independent of that found to be tainted. (*Nardone,* supra; *Wong Sun,* supra; and *Silverthorne,* supra.) So here, if it be assumed that defendant, as distinguished from the declarant, may assert that the evidence in the room must be excluded as the product of statements improperly elicited from the declarant he must show further that there were no independent guidelines to the discovery of this evidence. The facts rebut such a conclusion. With knowledge of defendant's participation in the telephone calls, and the use of his car by the codefendant, the officers would have been remiss in the performance of their duties if they had failed to immediately investigate in a legal manner the apparent site of the operations, before the failure of the codefendant to return would give rise to suspicions which would permit the destruction or disposition of any possible remaining supply of these ostensible peddlers.

Furthermore, it is noted that in *Wong Sun* the United States Supreme Court did not display equal solicitude for each defendant. The contraband, which would not have been discovered except for the statements improperly wrung from petitioner Toy, was excluded as to him (371 U.S. at pp. 487-488) but as to petitioner Wong Sun, the opinion states: "We must then consider the admissibility of the narcotics surrendered by Yee. Our holding, supra, that this ounce of heroin was inadmissible against Toy does not com-

pel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial. Cf. Goldstein v. United States, 316 U.S. 114." (*Id.* at pp. 491-492.)

The Supreme Court of this state has recognized that one defendant may properly object to the use of illegally obtained and improperly admitted declarations of a codefendant which contain matter which is accusatory of the former, even though a cautionary instruction to only apply the evidence to the latter has been given. (See People v. Aranda (1965) 63 A.C. 542, 550-551; People v. Marbury (1965) 63 A.C. 601, 605-606; and People v. Gilbert (1965) 63 A.C. 722, 733-734; and cf. People v. Underwood (1964) 61 Cal. 2d 113, 124.) No case is found, however, which says one defendant may assert objections which might properly be asserted by the declarant, when the declarant himself has not asserted them. It is obvious that the codefendant was attempting to cooperate and secure consideration for himself. Neither he nor the officers at that time could be charged with knowledge of the principles of *Dorado* or its precursor *Escobedo.* (Escobedo v. Illinois (1964) 378 U.S. 478.) Whatever the hypothesis that must be assumed between the declarant and the authorities, it is unreasonable to speculate as to what might have, or should have happened

so as to relieve a third party of the consequences of what was a reasonable investigation at the time it was made. It is concluded that defendant has no standing to raise *Dorado* objections to pre-*Escobedo* declarations of a nonobjecting codefendant which are used, not to establish his guilt, but only to establish reasonable cause for his arrest or a search of the premises in which he was found. The declarations were properly before the court on the legal issues presented by the entry of defendant's room.

3. *The Search of the Room*

"[A] search is not 'incidental to an arrest' unless it is limited to the premises where the arrest is made; is contemporaneous therewith; has a definite object; and is reasonable in scope." (People v. Cruz (1964) 61 Cal. 2d 861, 866; and see People v. Faris, supra, 63 A.C. 566, 570; People v. Shelton (1964) 60 Cal. 2d 740, 744; People v. Haven, supra, 59 Cal. 2d 713, 719; Casteneda v. Superior Court (1963) 59 Cal. 2d 439, 442; Tompkins v. Superior Court (1963) 59 Cal. 2d 65, 67; People v. Gorg, supra, 45 Cal. 2d 776, 781.) The entry and search of the hotel room cannot, therefore, be justified as incidental to the arrest of defendant's codefendant and the People concede this is so.

"[I]f the defendant or someone with apparent authority, consents to the entry, and the entry is made in good faith, it is not unlawful." (People v. Howard (1958) 166 Cal. App. 2d 638, 651 [hearing in S.Ct. den. Feb. 25, 1959]; and see People v. Terry (1962) 57 Cal. 2d 538, 558-559; People v. Burke (1956) 47

Cal. 2d 45, 49; People v. Michael (1955) 45 Cal. 2d 751, 753; People v. Mersino (1965) 237 A.C.A. 338, 346-347; People v. Justiniano (1965) 236 A.C.A. 594, 596; People v. Amado (1962) 208 Cal. App. 2d 780, 781-782; People v. Hughes (1960) 183 Cal. App. 2d 107, 114-115; People v. Bouchard (1958) 161 Cal. App. 2d 302, 305.) "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." (People v. Michael, supra, 45 Cal. 2d at p. 753; and see People v. Bilderbach, supra, 62 Cal. 2d 757, 762-763; People v. Shelton, supra, 60 Cal. 2d 740, 746; Casteneda v. Superior Court, supra, 59 Cal. 2d 439, 442; People v. Terry, supra, 57 Cal. 2d 538, 559; People v. Burke, supra, 47 Cal. 2d 45, 49; People v. Gorg, supra, 45 Cal. 2d 776, 782; People v. Mersino, supra, 237 A.C.A. 338, 346-347; and People v. Justiniano, supra, 236 A.C.A. 594, 596.) A finding either way which is supported by substantial evidence will be upheld. (People v. Bilderbach, supra; People v. Terry, supra; People v. Burke, supra; People v. Mersino, supra.) It is concluded that the trial court could properly find on conflicting evidence that the codefendant consented to the entry and search of the room which he shared with defendant.

In Casteneda v. Superior Court, supra, 59 Cal. 2d 439, the court found as a matter of law that the prosecution failed to discharge the burden of presenting substantial evidence of consent to the search when the

most that could be inferred from the evidence was that the accused, after his arrest, sought to placate the officers and hoped that by agreeing to the search of other premises he would forestall the search of his home and the discovery of incriminating evidence. (59 Cal. 2d at pp. 443-444; and see People v. Faris, supra, 63 A.C. 566, 570-571; People v. Shelton, supra, 60 Cal. 2d 740, 745; and People v. Haven, supra, 59 Cal. 2d 713, 720.) In this case, if the officers are to be believed, there was no such evasive conduct as in the last-mentioned cases. The fact that the codefendant was in custody is a matter to be considered (Casteneda v. Superior Court, supra), but does not require a holding as a matter of law that he acted because of an unlawful assertion of authority by the officers. (People v. Burke, supra; People v. Mersino, supra.) It is possible for one under arrest to cooperate with the authorities. (See People v. Terry, supra.)

A more serious problem is presented by the question of the right of the codefendant to consent to an entry and search of jointly shared living quarters in derogation of the rights of his cotenant, the defendant. In Tompkins v. Superior Court, supra, the opinion concluded: "Accordingly, we hold that one joint occupant who is away from the premises may not authorize police officers to enter and search the premises over the objection of another joint occupant who is present at the time, at least where as in this case, no prior warning is given, no emergency exists, and the officer fails even to disclose his purpose to the occupant who is present or to inform him that he has the consent

of the absent occupant to enter." (59 Cal. 2d 65, 69; and see People v. Cruz, supra, 61 Cal. 2d 861, 866-867; People v. Shelton, supra, 60 Cal. 2d 740, 745-746; People v. Porter (1964) 227 Cal. App. 2d 211, 214.) The limiting language of *Tompkins* (see People v. Terry, supra, 61 Cal. 2d 137, 151, fn. 9), suggests that a joint occupant who is at the premises is not divested of his incidents of possession and control or otherwise hampered because of a necessity to protect the privacy of his roommate. (See People v. Howard, supra; People v. Hughes, supra; and People v. Amado, supra, in each of which cases the accused was on the premises and entry was consented to by another.) It is concluded that where entry was effected peaceably with the consent and in the presence of one joint occupant, and without objection by the other, that the latter cannot assert a violation of his rights.

The record does show that defendant never consented to the entry or search. His failure to object, in submission to the express or implied assertion of authority by the officers, cannot be construed as a consent. (People v. Shelton, supra, 60 Cal. 2d 740, 746; People v. Di Blasi (1964) 228 Cal. App. 2d 338, 342; People v. Porter, supra, 227 Cal. App. 2d 211, 214-215; and see People v. Cockrell (1965) 63 A.C. 691, 697.) In the absence of the effective consent of the codefendant to, or the existence of probable cause to arrest defendant before the entry, the officers had no right to walk in uninvited by him (People v. Haven, supra, 59 Cal. 2d 713, 717; People v. Di Blasi, supra, 228 Cal. App. 2d 338, 341-342; People v. Porter,

supra, 227 Cal. App. 2d 211, 215); and in such event, a subsequent consent by defendant, as a product of the illegal conduct, could not justify a search predicated thereon. (People v. Shelton, supra, 60 Cal. 2d 740, 745; People v. Haven, supra, 59 Cal. 2d 713, 718; People v. Di Blasi, supra, 228 Cal. App. 2d 338, 342; and People v. Porter, supra, 227 Cal. App. 2d 211, 214; and see People v. Bilderbach, supra, 62 Cal. 2d 757, 762.)

The borderline quality of the efficacy of the consent of the cotenant on the rights of defendant, dictates that consideration be given to the questions of whether there was reasonable cause to arrest the defendant, and if such arrest was legally effected.

4. *The Arrest of Defendant*

Even if it be assumed that there was no consent binding on defendant, to the entry and search of the room, the search was nevertheless lawful if it was incident to a valid arrest. (People v. Cockrell, supra, 63 A.C. 691, 697; People v. Maddox (1956) 46 Cal. 2d 301, 304-305; People v. Martin, supra, 45 Cal. 2d 755, 762; People v. Hughes, supra, 183 Cal. App. 2d 107, 115; and see People v. Gilbert (1965) 63 A.C. 722, 738.) Defendant does not seriously question the existence of probable cause for arrest. The facts, hereinabove mentioned in connection with the nonprejudicial effect of the admission of hearsay testimony, give rise to probable cause to believe that defendant was a coconspirator with, or aiding and abetting his codefendant in narcotics traffic. He asserts that the

failure of the officers to comply with the demand and explanation requirements and provisions of section 844 of the Penal Code vitiates the arrest. A similar contention was raised in Ker v. California (1963) 374 U.S. 23 at pages 37-41, wherein the United States Supreme Court upheld the right under California decisional law to enter quietly and without announcement in effecting a legal arrest so as to prevent the destruction of contraband. (See also People v. Gilbert, supra, 63 A.C. 722, 739; People v. Cockrell, supra, 63 A.C. 691, 697-698; People v. Maddox, supra, 46 Cal. 2d 301, 305-307; People v. Martin, supra, 45 Cal. 2d 755, 762-763; and People v. Ker (1961) 195 Cal. App. 2d 246, 255-256.)

5. *The Sufficiency of the Evidence*

Defendant points to the fact that he was not a party to the telephone call giving rise to the transaction —transportation of narcotics—of which he was convicted. In fact the evidence reflects that he had not talked with the special employee for two or three weeks prior to the occasion in question. He isolates the use of his automobile and the discovery of contraband with his personal effects, and claims neither will support an inference that he did "aid and abet" in the commission of the offense charged, nor, that "not being present [he] . . . advised and encouraged its commission." (Pen. Code §31; and see People v. Belenger (1963) 222 Cal. App. 2d 159, 162-167; People v. Pearl (1963) 211 Cal. App. 2d 783, 789-790; and People v. Hill (1946) 77 Cal. App. 2d 287, 293-294.)

In People v. Belenger, supra, it is said: "An aider and abettor is 'liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.' (People v. Villa, supra, 156 Cal. App. 2d 128, 134.) In this case, defendant knew of the wrongfulness of Burton's acts. He must have known that the use of the automobile was necessary to completion of the crime, and surrendered possession and control of the automobile to the wrongdoer. In People v. Ellhamer (1962) 199 Cal. App. 2d 777, the court noted at page 782 [18 Cal. Rptr. 905]: 'Although the guilt of the aider and abettor is dependent upon the actor's crime, the criminal intent of the aider and abettor is *presumed* from his actions with knowledge of the actor's wrongful purpose.' [Italics added.] Therefore, there was sufficient evidence for the trial court to have found that defendant aided and abetted Burton in the commission of the crime." (222 Cal. App. 2d at pp. 166-167.) The use of defendant's automobile by one with whom he resides will support the inference that the surrender of possession and control was conscious and permissive. The presence of defendant in the room immediately after the apprehension of his codefendant gives rise to the inference that he was there a few minutes before and witnessed the codefendant's preparations for departure on his illicit mission. A finding of knowledge of the particular nefarious act with which he is charged is further supported by his participation in the general conversations between the special employee and the occupants of the room, by his particular representations in his last such conversation that, "I'll get some tomorrow or

Saturday . . . I'm not Mannie, but I'll have something," and by the storage of contraband with his personal effects. He is therefore, as in *Belenger,* charged with knowledge of and participation in the particular offense which was committed. Even if this were not so, his general course of conduct in keeping the ostensible prospective customer receptive, coupled with the surrender of possession of his car may well be considered as advising and encouraging the offense of transportation, which as a necessary step in the proposed sale, was thereby contemplated, and in fact resulted. (Cf. People v. Pearl, supra.) The protective cloak of innocence found in People v. Hill, supra, is herein shredded by defendant's acknowledged familiarity with the general negotiations for the sale, and his manifest cognizance of the presence of contraband of a type which presumably would be transported to effect that transaction in the car he suffered his roommate to use.

The judgment is affirmed.

Sims, J.

We concur:

Sullivan, P. J.

Molinari, J.

Filed January 28, 1966,
Lawrence R. Elkington, Clerk.